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No. 19,736.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1905.

No. 248.

THOMAS E. HULBERT, Plaintiff in Error,

vs.

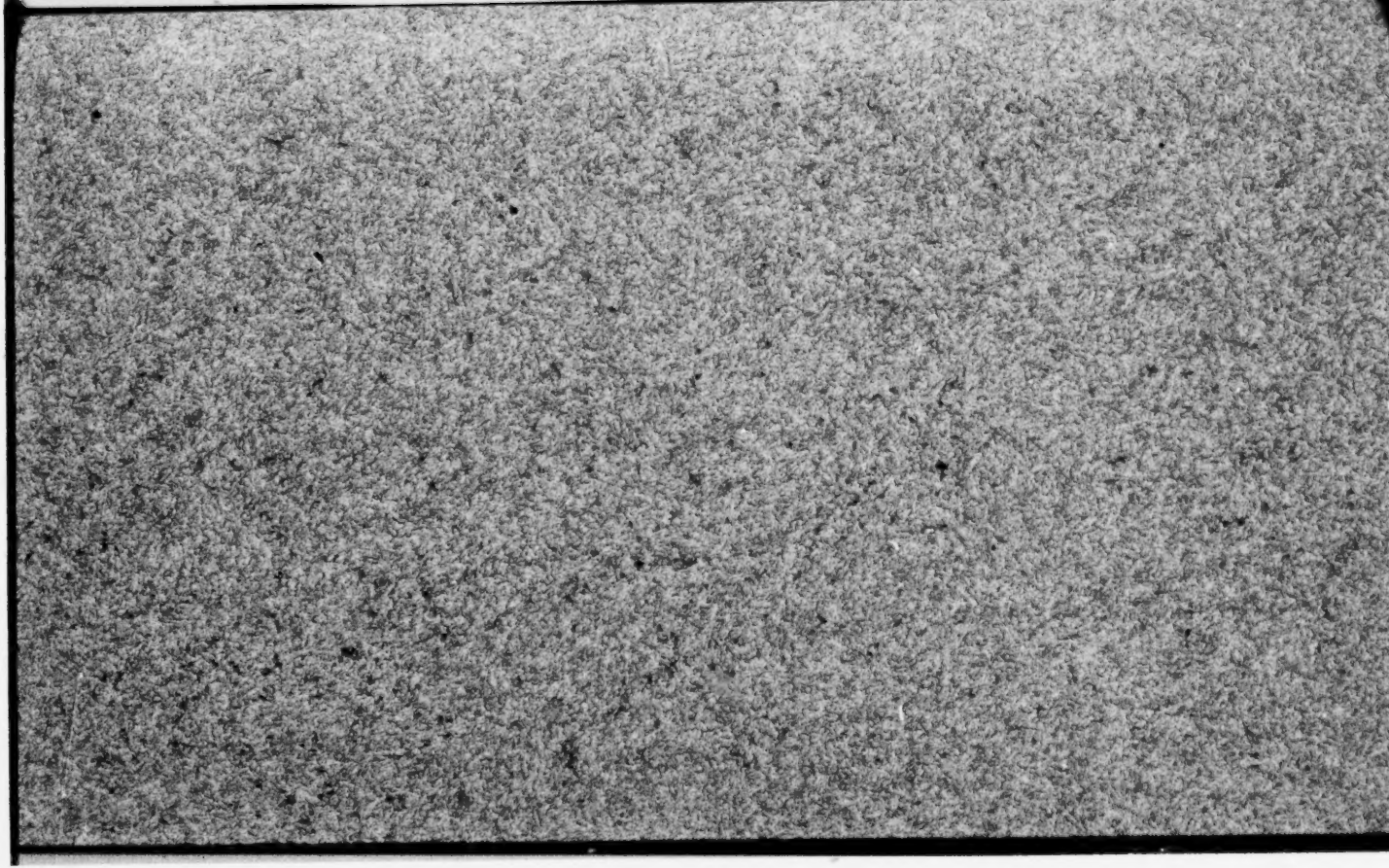
THE CITY OF CHICAGO, Defendant in Error.

Error to the Supreme Court of Illinois.

Brief on Behalf of Plaintiff in Error.

GEORGE W. WILBUR,

Attorney for Plaintiff in Error.



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I.

STATEMENT OF FACTS.

MAY IT PLEASE THE COURT:

In February, 1904, the defendant in error filed its petition in the County Court of Cook County, Illinois, praying that a special assessment be made in accordance with the terms of an ordinance passed by the City Council of Chicago, providing that Drake avenue, from Fullerton avenue to Milwaukee avenue, be paved with asphalt. Attached to the petition as a part thereof is a copy of the recommendation of the Board of Local Improvements, signed by the five members thereof; a copy of the estimate of

the engineer of the Board of Local Improvements, each being dated January 18, 1904, and a certified copy of the ordinance. The ordinance describes in detail the manner in which the proposed improvement is to be constructed. It also contains the following:

Said work to be done under the superintendence of the Board of Local Improvements of the said City of Chicago.

SECTION 2. That the recommendation of the Board of Local Improvements of the City of Chicago, providing for said improvement, together with the estimate of the cost thereof made by the engineer of said board, both hereto attached, be and the same are hereby approved.

SECTION 3. That said improvement shall be made and the whole cost thereof be paid for by special assessment in accordance with an act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14, A. D. 1897, and amendments thereto.

SECTION 4. That the aggregate amount herein ordered to be assessed against the property, and also the assessment on each lot and parcel of land therein assessed, shall be divided into five installments in the manner provided by the statute in such cases made and provided, and each of said installments shall bear interest at the rate of five per centum per annum according to law until paid.

SECTION 5. And for the purpose of anticipating the collection of the installments of said assessments for said improvement, bonds shall be issued, payable out of said installments, bearing interest at the rate of five per centum per annum, payable annually, and signed by the mayor and by the president of the Board of Local Improvements, countersigned by the city comptroller, and attested by the city clerk under the corporate seal of the City of Chicago. Said bonds shall be issued in accordance with and shall in all respects conform to the provisions of the act of the General Assembly of the State of Illinois, en-

titled "An Act Concerning Local Improvements," approved June 14, A. D. 1897, and the amendments thereto.

SECTION 6. That the attorney of said board be and he is hereby directed to file a petition in the County Court of Cook County, Illinois, in the name of the City of Chicago, praying that steps may be taken to levy a special assessment for said improvement in accordance with the provisions of this ordinance, and in the manner prescribed by law. (Print. Rec., 4-10.)

John A. May, superintendent of special assessments was directed by the court to make the assessment, and on March 26, 1904, roll was certified by May and filed. (Print. Rec., 11-17.)

A rule was entered to file objections, whereupon plaintiff in error filed certain objections, together with a description of his property. After the filing of objections, a hearing was had, wherein the legal objections were overruled, and evidence was heard on the question of benefits. On this hearing the assessment was confirmed in all respects, except as to the assessment against one lot. An appeal was taken from the finding of the trial court to the Supreme Court of Illinois, where the judgment of the County Court was affirmed. A writ of error was thereupon sued out of this court to reverse such judgment of affirmance.

By stipulation all evidence in regard to benefits has been omitted from the printed record, so that the only question before this court relates to the validity and constitutionality of the "Act Concerning Local Improvements," under which the present proceedings were instituted.

The objections filed in the County Court and

which raise a constitutional and federal question, are the following:

28. The law under which this proceeding is being carried on, as well as said ordinance and all proceedings herein, are illegal and void because such law and such ordinance and proceedings are in conflict with the constitution of Illinois, for the reason that they seek to deprive said petitioner, the City of Chicago, of certain rights and duties conferred upon and required of said petitioner, under and by virtue of the charter under which it was originated, and under which it now exists, and also because said law, ordinance and proceeding are in conflict with Section 18, Article 3, and Section 7, Article 5, and other sections and articles of Chapter 4, of an act relating to cities and villages. (Print. Rec., 19.)

31. The said act, in force June 14, 1897, and all amendments thereto, are illegal, unconstitutional and void, for the reason that said act and said amendments thereto are in conflict with the constitution of the State of Illinois, and with Section 9, Article 9 thereof.

32. Said act under which this proceeding is being carried on, and all amendments thereto, is and are unconstitutional and void, for the following among other reasons, to wit:

A. Said act, and the amedments thereto, are in conflict with the constitution of the State of Illinois and with Section 9, Article 9 thereof.

B. It confers upon the Board of Local Improvements sole, exclusive and arbitrary power over all local improvements, to the exclusion of the only constituted corporate authorities of said city, namely, the Common Council.

D. It seeks to deprive property owners and these objectors of the use and control of their property, and it authorizes the taking of such property in the manner prohibited by the constitution of the State of Illinois.

E. It confers upon mayors of cities having a population exceeding 100,000 the power to originate boards of local improvements, and to select mem-

bers thereof, which boards have sole, exclusive and arbitrary control and power over the construction of all local improvements, with or without petition from property owners affected thereby, and with or without any necessity for such improvements, and to the exclusion of the corporate authorities duly constituted as required by said constitution.

33. By reason of the unconstitutionality of said act, the proceedings before the Board of Local Improvements, the ordinance passed thereunder, and all other acts and proceedings therein, are illegal, unconstitutional and void.

35. The Legislature of the State of Illinois had no power, under the constitution of said state, to create said Board of Local Improvements, and to delegate to it legislative powers.

37. Said act concerning local improvements, passed June 14, 1897, and all amendments thereto, are not only contrary to the constitution of Illinois, but they are also contrary to the constitution of the United States and to the 14th amendment thereof.

38. Said act concerning local improvements, said ordinance which is the basis of the present proceedings, and all documents and orders relating thereto, are contrary to the constitution of the United States, and to the 14th amendment thereof, because such act, ordinance, document and orders seek to deprive objector of property without due process of law.

40. The proceedings herein, and said act, are contrary to the constitution of the United States, and to the 14th amendment thereof, because the petitioner herein, under and by virtue of said act and of said proceedings, seeks to deprive these objectors of their property without due process of law. Said proceedings and said act are also contrary to the constitution of the United States, and to the 14th amendment thereof, for the reasons set forth in the several foregoing objections.

It is urged on behalf of plaintiff in error as ground for reversing the judgments of the trial and Supreme courts:

1. That the act concerning local improvements, approved June 14, 1897, and amendments thereto, is in conflict with the 14th amendment to the constitution of the United States, because it seeks to deprive him of his property without due process of law.

2. That said act is in conflict with Section 2, Article 2, and with Section 9, Article 9 of the constitution of Illinois.

3. Because the Board of Local Improvements, which originates all ordinances for local improvements, is composed of members not elected by the people to be taxed, nor appointed in any manner to which they have given their consent; that, under said act, the members of the board are not required to take any oath or to give bonds for the faithful performance of their duties; that said act, in effect, provides for a system of taxation for local improvements without representation on the part of the persons to be taxed.

4. Because said act deprives the Common Council of all right and authority to originate any ordinance for a local improvement, or to amend or repeal an ordinance recommended by the Board of Local Improvements. Said Common Council is the only corporate authority empowered to originate ordinances for local improvements under the constitution of Illinois.

5. Said act and the ordinance made in pursuance thereof are each unconstitutional and void, because they restrict the right of contract in that each fixes the maximum and minimum rate of interest in improvement bonds provided for therein, at the rate

of five per cent. per annum. By reason of this provision the defendant in error is prevented from issuing and offering improvement bonds at a less rate of interest than five per cent, to the injury of plaintiff in error.

II.

ERRORS RELIED UPON.

First. The Supreme Court of Illinois erred in affirming the judgment of confirmation rendered by the County Court of Cook County against the property of plaintiff in error.

Second. The Supreme Court erred in not reversing and setting aside the judgment of confirmation rendered against the property of plaintiff in error by said County Court of Cook County.

Third. The Supreme Court of Illinois erred in holding that the County Court of Cook County had judisdiction to confirm the assessment appealed from as to the property of plaintiff in error.

Fourth. Said County Court erred in not sustaining the objections of plaintiff in error and each thereof.

Fifth. Said County Court erred in not holding that the ordinance, which is the basis of said proceedings, is contrary to the constitution of the State of Illinois, and contrary to the constitution of the United States and the 14th amendment thereof.

Sixth. Said Supreme Court erred in overruling the assignments of error of plaintiff in error and each thereof, and in not sustaining the same.

Seventh. Said County Court erred in not dismissing said proceedings on the ground that the statute under which such proceedings were instituted and carried on is in conflict with the constitution of the United States and with the 14th amendment thereof, as set forth in the objections interposed in said County Court on behalf of said plaintiff in error, and said Supreme Court erred in sustaining said County Court.

Eighth. Said judgment of said County Court and the order of affirmance of the Supreme Court of Illinois are each unconstitutional and void because each of said findings tends to deprive the plaintiff in error of his property without due process of law, and contrary to the provisions of the constitution of the United States and of the 14th amendment thereof.

Ninth. Said Supreme Court erred in sustaining the judgment in favor of said defendant in error and against the plaintiff in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff in error and against the defendant in error; and the plaintiff in error prays the judgment aforesaid may be reversed, annulled and held for nothing, and that he may be restored to all things which he has lost by occasion of said judgment of confirmation.,

III.

CITATION OF CONSTITUTION AND STATUTES OF ILLINOIS REFERRED TO HEREIN.

The plaintiff in error relies upon the following portions of the constitution of Illinois, and of the statutes thereof, in relation to special assessments:

ARTICLE II OF CONSTITUTION.

§ 2. No person shall be deprived of life, liberty or property without due process of law.

ARTICLE IX OF CONSTITUTION.

§ 9. The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of contiguous property, or otherwise. For all other corporate purposes all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property, within the jurisdiction of the body imposing the same.

AN ACT Concerning Local Improvements. [Approved June 14, 1897. In force July 1, 1897.]

§ 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* POWERS CONFERRED.] That the corporate authorities of cities, villages and incorporated towns are hereby vested with the power to make such local improvements as are authorized by law, by special assessment, or by special taxation, of contiguous property, or by general taxation, or otherwise, as they shall by ordinance prescribe:

Provided, That this act shall apply only to such cities and villages as are now, or shall hereafter become, incorporated under an act entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872, and

to all cities, villages and incorporated towns which have heretofore adopted article 9 of the act above mentioned, in the manner therein provided, or shall hereafter adopt this act, as herein provided; but all other corporate authorities, having power to levy special assessments or special taxes for local improvements, may make use of the provisions of this act for that purpose in the manner hereinafter provided.

§ 2. MUNICIPAL OFFICERS IN CITIES OF 50,000 INHABITANTS AND OVER.] In cities of this state having a population of fifty thousand (50,000) or more, by the last preceding census of the United States, or of this state, there shall be appointed and designated, in the manner provided by law, or if no such method be provided, then by appointment of the mayor, a commissioner of public works, a superintendent of streets, a superintendent of special assessments, a superintendent of sewers and a city engineer. The compensation of such officers, if not fixed by law, shall be determined by the city council or board of trustees, and no order, resolution or ordinance to change the same shall be passed within one month after its introduction and publication. Such offices shall not be discontinued at any time, by ordinance or otherwise, but vacancies therein shall be filled in the same manner as the original appointment. The appointees to said offices shall be subject to removal by the mayor, but the term of office shall be held to expire as soon after the end of the term of the mayor appointing as their successors shall be appointed and qualified. [As amended by act approved and in force May 9, 1901.

ORDINANCE AUTHORIZING IMPROVEMENTS—PETITION OF PROPERTY OWNERS.] § 4. When any such city, town or village shall, by ordinance provide for the making of any local improvement, it shall, by the same ordinance, prescribe whether the same shall be made by special assessment or by special taxation of contiguous property or general taxation, or both. * * *

§ 5. RESTRICTION ON PASSAGE OF ORDINANCE.] No ordinance for any local improvements, to be paid

wholly or in part by special assessment or special taxation, shall be considered or passed by the city council or board of trustees of any such city, village or town, unless the same shall first be recommended by the board of local improvements provided for by this act.

§ 6. BOARD OF LOCAL IMPROVEMENTS.] In cities within the terms of this act, having a population of one hundred thousand (100,000) or more, by the last preceding census of the United States, or of this state, there is hereby created a board of local improvements, consisting of the superintendent of special assessments and four other members; such four members shall be nominated by the mayor and shall be confirmed by the city council or board of trustees of such city; and no one of which, except such superintendent of special assessments, shall be the head of any department of the government of such city, or hold any other office or position therein. Said board shall elect from its members a president, a vice-president and an assistant secretary. The superintendent of special assessments shall be ex-officio secretary of the board. In the absence or the inability of the president and the secretary to act, the vice-president for the president, and the assistant secretary for the secretary, are hereby given full power to sign and execute contracts, vouchers, bonds, pay-rolls and all other papers, documents, and instruments necessary to carry this act and all proceedings hereunder into full force and effect. Said board shall hold daily sessions for the transaction of all business in rooms accessible to the public to be provided by the city council.

The city council or board of trustees of such city shall provide for salaries for said board of local improvements. * * *

§ 7. PROCEEDINGS PRELIMINARY TO PUBLIC HEARING.] All ordinances for local improvement to be paid for wholly or in part by special assessment or special taxation shall originate with the board of local improvements. Petitions for any such public improvement shall be addressed to said board. Said board shall have the power to originate a scheme

for any local improvement, to be paid for by special assessment or special tax, either with or without a petition, and in either case shall adopt a resolution describing the proposed improvement, which resolution shall be at once transcribed into the records of the board.

Whenever the proposed improvement will require that private property be taken or damaged, such resolution shall describe the property proposed to be taken for that purpose. Said board shall, by the same resolution, fix a day and hour for the public consideration thereof, which shall not be less than ten days after the adoption of such resolution. Said board shall also cause an estimate of the cost of such improvement (omitting land to be acquired) to be made in writing by the engineer of the board (if there be one, if not, then by the president) over his signature, which shall be itemized to the satisfaction of said board, and which shall be made a part of the record of such resolution. Notice of the time and place of such public consideration or hearing shall be sent by mail directed to the person who paid the general taxes for the last preceding year on each lot, block, tract or parcel of land fronting on the proposed improvement, not less than five (5) days prior to the time set for such public hearing. Said notice shall contain the substance of the resolution adopted by the board and the estimate of the cost of the proposed improvement, and a notification that the extent, nature, kind, character and estimated cost of such proposed improvement may be changed by said board at the public consideration thereof and that if upon such hearing the board shall deem such improvement desirable, it shall adopt a resolution therefor and prepare and submit an ordinance therefor as hereinafter provided. * * *

§ 8. PUBLIC HEARING.] At the time and place fixed in said notice for the public hearing, the said board shall meet and hear the representations of any person desiring to be heard on the subject of the necessity for the proposed improvement, the nature thereof, or the cost as estimated. In case any per-

son shall appear to object to the proposed improvement or any of the elements thereof, said board shall adopt a new resolution abandoning the said proposed scheme or adhering thereto, or changing, altering or modifying the extent, nature, kind, character and estimated cost, provided such change shall not increase the estimated cost of the improvement to exceed twenty (20) per centum of the same without a further public hearing thereon, as it shall consider most desirable; and thereupon, if the said proposed improvement be not abandoned, the said board shall cause an ordinance to be prepared therefor, to be submitted to the council or board of trustees (as the case may be). Such ordinance shall prescribe the nature, character, locality and description of such improvement and shall provide whether the same shall be made wholly or in part by special assessment or special taxation of contiguous property; and, if in part only, shall so state.

If property is to be taken or damaged for said improvement, such ordinance shall describe the same with reasonable certainty. * * *

§ 9. RECOMMENDATION BY BOARD.] With any such ordinance, presented by such board to the city council or board of trustees, shall be presented also a recommendation of such improvement by the said board, signed by at least a majority of the members thereof. The recommendation by said board, shall be *prima facie* evidence that all the preliminary requirements of the law have been complied with, and if a variance be shown on the proceedings in the court, it shall not affect the validity of the proceeding, unless the court shall deem the same wilful or substantial.

§ 10. ESTIMATE OF COST.] Together with the said ordinance and recommendation shall be presented to the city council or board of trustees, an estimate of the cost of such improvement, as originally contemplated, or as changed, altered or modified at the public hearing, itemized so far as the board of local improvements shall think necessary, over the signature of the engineer of the board, if

there be one; if not, then the president of said board, who shall certify that, in his opinion, the said estimate does not exceed the probable cost of the improvement proposed, and the lawful expenses attending the same. The recommendation by said board shall be *prima facie* evidence presumed to be based upon a full compliance with the requirements of the act.

§ 36. SPECIAL ASSESSMENT.] When the ordinance under which a local improvement is ordered to be made, containing no provisions for the condemnation of private property therefor, shall provide that such improvement shall be wholly or in part paid for by special assessment, the proceedings for the making of such assessment shall be in accordance with the following provisions of this act.

§ 37. JURISDICTION OF COURTS.] Upon the passage of any ordinance for a local improvement pursuant thereto, it shall be the duty of the officer specified therein, to file a petition in some court of record in said county, in the name of such municipality, praying that steps [may] be taken to levy a special assessment for the said improvement, in accordance with the provisions of the said ordinance. The several Circuit and County Courts of this State, and the Superior Court of Cook county, shall have jurisdiction of any proceeding under this act. There shall be attached to or filed with such petition a copy of the said ordinance, certified by the clerk, under corporate seal; also a copy of the recommendation of the board of local improvements, and of the estimate of the cost, as approved by the legislative body. The failure to file any, or either of said copies shall not affect the jurisdiction of the court to proceed in said cause, and to act upon said petition, but if it shall appear in any such cause that such copies have not been attached to or filed with said petition before the filing of the assessment roll therein, then, upon motion of any objector for that purpose, on or before appearance day in said cause, the entire petition and proceeding shall be dismissed.

§ 38. (ORDER FOR ASSESSMENT.) Upon the filing of such petition, the superintendent of special assessments, in cities where such officer is provided for by law, otherwise some competent person appointed by the president of the board of local improvements, shall make a true and impartial assessment of the cost of the said improvement upon the petitioning municipality and the property benefited by such improvement.

§ 39. APPORTIONMENT OF COST.] It shall be the duty of such officer to estimate what proportion of the total cost of such improvement will be of benefit to the public, and what proportion thereof will be of benefit to the property to be benefited, and to apportion the same between the city, village or town and such property, so that each shall bear its relative equitable proportion; and having found such amounts, to apportion and assess the amount so found to be of benefit to the property, upon the several lots, blocks, tracts and parcels of land, in the proportion in which they will be severally benefited by such improvement: *Provided*, that no lot, block, tract or parcel of land shall be assessed a greater aomunt than it will be actually benefited; and when the proposed improvement is for the construction of a sewer, to investigate and report the district which will be benefited by such proposed sewer, describing the same by boundaries.

§ 41. ASSESSMENT ROLL—NOTICES.] The assessment roll shall contain a list of the lots, blocks, tracts and parcels of land assessed for the proposed improvement, the amount assessed against each, the name of the person who paid the taxes on each such parcel during the last preceding calendar year in which taxes were paid, as ascertained upon investigation by the officer making the return, or under his direction, the residence of the person so paying the taxes on each such parcel if the same can on diligent inquiry be found; in case of assessment in installments the amount of each installment shall also be stated; and the officer making such roll shall certify under oath that he verily believes that

the amounts assessed against the public and each parcel of property are just and equitable, and do not exceed the benefit which will in each case be derived from said improvement, and that no lot, block, tract or parcel of land has been assessed more than its proportionate share of the cost of said improvement. * * *

§ 42. (DIVISION OF ASSESSMENT INTO INSTALLMENTS —PAYMENT OF INTEREST.) It shall be lawful to provide by the ordinance for any local improvement, any portion of the cost of which is to be defrayed by special assessment or special taxation, or by ordinance passed at any time before the confirmation of the assessment roll, that the aggregate amount assessed, and each individual assessment, and also the assessment against the municipality on account of property owned by the municipality and for public benefits, be divided into installments, not more than ten (10) in number: *Provided, however,* that any such special assessment or special tax levy for building sewers, subways or viaducts may in like manner be divided into not exceeding twenty (20) installments. In all cases such division shall be made so that all installments shall be equal in amount, except that all fractional amounts shall be added to the first installment, so as to leave the remaining installments of the aggregate equal in amount and each a multiple of one hundred dollars ($100). * * *

All installments shall bear interest as hereinafter provided until paid, at the rate of five (5) per centum per annum. Interest on assessments shall begin to run from the date of the first voucher issued on account of work done as aforesaid. * * *

§ 86. BONDS TO ANTICIPATE INSTALLMENTS OF ASSESSMENT.] For the purpose of anticipating the collection of the second and succeeding installments, provided for in this act, it shall be lawful for such city, village or town, to issue bonds, payable out of said installments, bearing interest at the rate of five per centum per annum, payable annually and signed by such officers as may be by ordinance pre-

scribed; said bonds shall be issued in sums of one hundred dollars, or some multiple thereof, and shall be dated and draw interest from the date of the issuing of the same. Each bond shall state on its face out of which installment it is payable, and shall state, by number or other designation, the assessment to which such installment belongs. The principal of such bonds shall not exceed, in the aggregate, the amount of such deferred installments, and shall be divided into as many series as there are deferred installments: * * *

AN ACT to provide for reports to be made by the board of local improvements to the city council or board of trustees, and in reference to the repealing of ordinances for local improvements. [Approved and in force May 10, 1901.]

REPEAL OF ORDINANCE.] § 1. *Be it enacted by the People of the State of Illinois represented in the General Assembly:* No repeal of any ordinance ordering an improvement shall be made except on written recommendation of the board of local improvement (stating therein its reasons therefor).

IV.

BRIEF.

The act entitled, "An Act Concerning Local Improvements," passed June 14, 1897, and amendments thereto, is contrary to section 2, article 2, and section 9, article 9, of the constitution of Illinois.

The board of local improvements is not a municipal corporation, and it has no authority to make special assessments.

Harward v. *St. Clair & M. L. & D. Co.*, 51 Ill., 130.
Cornell v. *People*, 107 Ill., 372.
Updike v. *Wright*, 91 Ill., 49.
Gage v. *Graham*, 57 Ill., 144.
Dunham v. *People*, 96 Ill., 331.
Wetherell v. *Devine*, 116 *id.*, 631.
Snell v. *Chicago*, 133 *id.*, 413.
The People v. *Knopf*, 171 id., 191.

Sections 42 and 84 of said act are unconstitutional and void because they interfere with right of contract by fixing the rate of interest on assessments and improvement bonds at five per cent.

Ritchie v. *People*, 155 Ill., 98.
McChesney v. *People*, 200 *id.*, 146.
Adams v. *Brennan*, 177 Ill., 194.
Frorer v. *People*, 141 *id.*, 171.
Millett v. *People*, 117 *id.*, 294.
Bailey v. *People*, 190 *id.*, 28.

V.

ARGUMENT.

Plaintiff in error has brought the present proceedings to this court by writ of error to the Supreme Court of Illinois, upon the ground that an act entitled "An Act Concerning Local Improvements," passed by the legislature of Illinois June 14, 1897, and amendments thereto, being the act under which this proceeding was instituted, is unconstitutional and void; that such act and amendments are in conflict with the Fourteenth Amendment to the Constitution of the United States.

The plaintiff in error feels justified in claiming that the said act is clearly contrary to Section 9, Article 9 of the Constitution of Illinois and cited herein. There are many decisions of the Supreme Court of Illinois which seem to support this contention, while there is only one to the contrary, so far as I have been able to discover.

The portions of the act which are under consideration herein are set forth in full in a previous division hereof, so that a reference to the various sections may answer the present purpose.

The act provides for the creation of a board of local improvements, consisting of five members, one of whom shall be the superintendent of special assessments, while the other four members are to be nominated by the mayor and confirmed by the common council. This board, when formed in the man-

ner provided for, has sole and exclusive jurisdiction over all matters relating to special assessments and special taxation. As will be seen by the act, all ordinances for special assessments must originate with the board. While there is a provision for a petition by the property owners concerned in a local improvement, still, it is within the power of the board to originate such ordinance without a petition, and even in the face of the protest of a majority of the owners. The act also provides for an estimate of the cost of the improvement to be prepared by the engineer of the board. This estimate, together with the ordinance so prepared by the board, is then submitted to the common council with a recommendation of the board for the approval thereof. The common council, under the act, has only the right to approve or reject such ordinance. It will be seen by the act that all powers of discretion, so far as the common council is concerned, have been entirely taken away, and that it can do only one of two things, as stated above. It cannot amend such ordinance in any particular, and it cannot originate or propose any ordinance for a local improvement. Under a recent amendment to the act the common council is deprived even of the power to repeal an ordinance for a local improvement, except upon the written recommendation of the board of local improvements.

Section 9, Article 9, of the Constitution of Illinois, and cited above, is in part as follows:

> "The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of contiguous property, or otherwise."

By this provision of the constitution, only the corporate authorities of cities can be vested by the legislature with power to make local improvements by special assessments or special taxation. The term "corporate authorities" and the powers and duties thereof, may be too well-known to require any explanation. Without citing authorities, it will probably be conceded and not disputed, that a municipal corporation is one having certain powers and duties of a legislative character; that these powers and duties are restricted within the terms of the constitution and the charter creating such corporation. Under the section of the Constitution of Illinois above referred to, the General Assembly is authorized to vest corporate authorities with power to make local improvements by special assessment or by special taxation. Under this section, however, the general assembly is not authorized to vest the mayors of certain cities with powers to nominate individuals, satisfactory to themselves, which individuals, when confirmed by the common council of the particular city, become at once a legislative body with sole and exclusive powers over all matters relating to special assessments and special taxation.

That the board of local improvements is not a municipal corporation, within the requirements of the Constitution of Illinois and the laws of said state, seems too plain for argument. The powers, however, which the legislature has sought by the act complained of to confer upon the board of local improvements, to be selected in the manner aforesaid, are extremely important and involve the highest rights in relation to real estate—rights which the

constitution and the laws have always endeavored to protect in the most careful manner; that such rights have not been so protected is the reason of the present appeal to this court.

It will be noticed that the act does not provide that it shall be submitted for adoption to the voters of the district to be affected thereby, so that there is nothing in the act itself which affords the property owner an opportunity to approve or disapprove of the provisions thereof. In other words, the plaintiff in error claims that the act provides for a system of taxation without representation, and for this reason it is not only contrary to the Constitution of Illinois and the section above referred to, but it is also contrary to the Constitution of the United States, because it is in conflict with the principle of taxation which has been in existence and has been maintained since the formation of the government.

The Constitution of Illinois particularly specifies the body which the legislature may vest with authority to make local improvements, yet the act complained of, without any change in the constitution, has entirely done away with such provision in as effective a manner as though it had never been adopted. And in lieu of such provision the legislature has sought to vest the board of local improvements with the same power in regard to local improvements as was previously vested in corporate authorities of cities. It may be claimed that the act does not wholly deprive the common council of its power in relation to special assessments because the ordinance which is prepared by the board

of local improvements is finally submitted to the common council for passage. While this is true, yet it is also true that the common council has no voice in the subject-matter of the ordinance or of any of the provisions thereof. The council is stripped of all power concerning the ordinance save, *pro forma*, to vote upon its approval or rejection. The mere clerical right to approve or reject amounts to nothing when the actual right to originate, alter or amend has been taken away. It is difficult to conceive of a municipal corporation which has only the power to approve or disapprove of ordinances previously and exclusively prepared by individuals outside of and in no way connected with such corporation.

The construction of local improvements in the City of Chicago is a matter of the greatest importance, and involves the annual expenditure of several millions of dollars. This vast sum is levied upon real estate in a summary manner, and its payment is exacted by the most direct means possible. For this reason it is extremely important to all property owners that the power to carry on such proceedings and to enforce such summary collection, should be vested in a body created in strict accord with the constitution. That the board of local improvements, as constituted under the act complained of, is not such a body is the contention of the plaintiff in error. He also feels justified in urging in this court that by reason of the provisions of the local improvement act, and the amendments thereof, he is being deprived of his property without due process of law and in a manner contrary to the

Constitution of the State of Illinois and contrary to many decisions of the highest court of that state. That legislation in regard to taxation should be enacted in an orderly and legal manner, and by individuals directly responsible to the people to be taxed, or appointed in some manner to which they have given their consent, will probably not be disputed. If this be the law, then the question to be determined by this court is whether or not the plaintiff in error, under the act complained of, is being deprived of his constitutional rights.

A perusal of the portions of the act set forth herein will show that it is arbitrary beyond all precedent. By it the property owners are deprived of all voice in regard to the character of an improvement, the necessity therefor, or the time of its construction; that it lies wholly within the power of the board of local improvements to say when, how and in what manner an improvement shall be made, and the law specially provides that the cost of the improvement, by way of assessment, shall be made by the superintendent of special assessments. That the law in this regard is impossible of performance may well be urged when we take into consideration the number of local improvements that are continually being made in the City of Chicago, the benefit of all of which improvements must be determined, as to each piece of property involved, by a single individual, and he must be so certain as to each particular assessment that he is willing to make his oath thereto, as he did in the proceedings now before this court.

The Supreme Court of Illinois, on a number of oc-

casions, has passed upon the question as to what is a corporate authority under the Constitution of Illinois, and also as to what authorities are authorized to levy special assessments or special taxes for local improvements. Some of the opinions of the latter court seem to have a direct bearing upon the contention of plaintiff in error herein, and for that reason citations of considerable length are given.

The case of *Harward* v. *St. Clair & Monroe L. & D. Co.*, 51 Ill., 130, which opinion was rendered in 1869, contains the following (135):

"The power of taxation is, of all the powers of government, the one most liable to abuse, even when exercised by the direct representatives of the people, and if committed to persons who may exercise it over others without reference to their consent, the certainty of its abuse would be simply a question of time. No person or class of persons can be safely entrusted with irresponsive power over the property of others, and such a power is essentially despotic in its nature, and violative of all just principles of government. It matters not that, as in the present instance, it is to be professedly exercised for public uses, by expending for the public benefit the tax collected. If it be a tax, as in the present instance, to which the persons who are to pay it have never given their consent, and imposed by persons acting under no responsibility of official position, and clothed with no authority of any kind by those whom they propose to tax, it is, to the extent of such tax, misgovernment of the same character which our forefathers thought just cause for revolution. We are of opinion that we do no violence to the language of the clause in the constitution we have been considering by holding that it was designed to prevent such ill-advised legislation as the delegation of the taxing power to any person or persons other than the 'corporate authorities' of the municipality or district to be taxed. These authorities are elected

by the people to be taxed, or appointed in some mode to which the people have given their assent, and to them alone can this power be safely delegated.

"This construction of the constitution is decisive against the validity of the tax under consideration, for it cannot be, and is not claimed, that this drainage incorporation, or the persons who compose it, are the corporate authorities in any sense of the district over which the act in question seeks to give them the power of taxation. As already said, the persons to be taxed have never given their assent to this act, and have had no voice in the selection of the members of this corporation. As the object of this constitutional clause was to prevent the legislature from granting the power of local taxation to persons over whom the population to be taxed could exercise no control, it is evident that, by the phrase 'corporate authorities,' must be understood those municipal officers who are either directly elected by such population or appointed in some mode to which they have given their assent. Another reason why the members of this drainage company cannot be considered corporate authorities is, that the constitution prohibits the legislature from appointing to office, and if these persons are corporate authorities, they have been appointed to that position by the legislature."

In *Updike* v. *Wright*, 81 Ill., 49, is the following (53):

"* * * It was also held, that power in the legislature was subject to the further limitation that a local burden of taxation or special assessments could not be imposed upon a locality without the consent of the taxpayers to be affected.

"That section of the constitution of 1870, upon this subject, provides 'the General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be

vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.'

"The clause in the present constitution, like that in the constitution of 1848, must be construed as a limitation on the power of the legislature. Giving it that construction, the General Assembly can only vest cities, towns and villages with power to make local improvements by special assessments, or special taxation upon contiguous property benefited by such improvement. By necessary implication, it is inhibited from conferring that power upon other municipal corporations or upon private corporations. Only cities, towns and villages are within the constitutional provisions, and, although other municipal corporations may be vested with power to assess and collect taxes for corporate purposes, the limitation is absolute, such taxes shall be uniform in respect to persons and property within the jurisdiction imposing the same.

"With equal propriety, this clause of the present constitution, like the same provision in the former constitution, must be regarded as restricting the General Assembly in conferring the power to levy and collect taxes, either general or special, to the mode and manner therein indicated. We do not understand the legislature possesses plenary power, unlimited and unrestricted, to invest whomsoever it may choose with authority to assess and collect either special assessments or taxes for every conceivable purpose. As we have seen, only cities, towns and villages may levy special assessments or special taxation for local improvemnts, and all other municipalities can only be vested with jurisdiction to assess and collect taxes for corporate purposes, and that, too, under the positive inhibition such taxes shall be uniform in respect to persons and property. It would seem, therefore, to follow, as a corollary from the propositions stated, that neither the commissioners nor the juries selected, nor the County Court, is such a body as, under the constitution, may be given power to make local im

provements by special assessments or by special taxation upon contiguous property.

"There is still another consideration that has an important bearing on the decision of the case. The clause of the constitution we have been considering, like that in the constitution of 1848, must be understood, in the light of the decisions of this court, as forbidding the General Assembly from imposing a burden, by taxation, upon any locality, without the consent of the citizens affected."

In *Cornell* v. *People ex rel.*, 107 Ill., 372, is the following (379):

"The constitution of 1848, which was in force when the Act of 1869 was passed, provides: 'The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same.' This clause of the constitution has been before the court for construction in a number of cases, and the decisions of this court are uniform to the effect that the clause is a limitation upon the power of the legislature to confer the right to assess and collect taxes upon any other persons than the corporate or local authorities of the municipality or district to be taxed. *Harward* v. *St. Clair and Monroe Levee and Drainage Co.*, 51 Ill., 130; *Updike* v. *Wright*, 81 *id.*, 49; *People* v. *Mayor*, 51 *id.*, 17; *People* v. *Morgan*, 90 *id.*, 558.

"The corporate authorities intended by the language of the constitution, upon whom the power of taxation was conferred, are such municipal officers as have been elected directly by the people of the district, or appointed in some mode to which the people of the district have given their assent. Upon this point, in the *Harward* case, it is said: 'These authorities are elected by the people to be taxed, or appointed in some mode to which the people have given their assent, and to them alone can this power be safely delegated.' In *The People* v. *Morgan*,

supra, in the discussion of the question, it is said: 'Under Section 10 of Article 9 of the constitution, the General Assembly is prohibited from imposing taxes on municipalities, and, under Section 9, can only vest the corporate authorities of such bodies with power to levy and collect taxes for corporate purposes.' Thus it is held that the people in such bodies must assent thereto by electing the authorities, or, by a vote for the charter, assent to their appointment by some other officer or person.

"Section 9 of Article 9 of the constitution of 1870, has received the same construction that was placed upon the constitution of 1848 on the same subject. (*Updike* v. *Wright*, 81 Ill., 49; *Dunham* v. *People*, 96 *id.*, 331.) In the last case cited, it is said: 'The clause in the constitution of 1870, adopted in the light of this construction, must be construed in the same manner as was construed the kindred clause in the constitution of 1848.'"

In *Gage* v. *Graham*, 57 Ill., 144, is the following (146):

But there is another objection in this case that is fatal to the tax. It is, that the law under which it is levied is repugnant to the constitution. In the case of *Harward* v. *The St. Clair & Monroe Levee & Drainage Co.*, 51 Ill., 130, it was held, that section 5 of article 9 of the constitution of 1848, was a limitation upon the power of the legislature to delegate the right of corporate or local taxation to any other than the corporate local authorities, and by the phrase "corporate authorities," must be understood those municipal officers who are either directly elected by the people to be taxed, or appointed in some mode to which they had given their assent. And the same construction was adopted and applied in *The People* v. *The Mayor, etc., of Chicago*, 51 Ill., 17; and again, in *The People* v. *Canty*, 55 Ill., 33.

The first section of the law under which this tax was levied creates persons therein named a body corporate. The second section authorizes the corporation to survey, locate, complete and alter ditch-

es, embankments, culverts, bridges and roads, and to maintain and keep them in repair, on the lands in certain townships, in one of which the lands in controversy are situated. * * *

It will be perceived that these officers are not elected, or appointed with the assent of a municipal corporation, nor with the assent of the persons to be taxed or assessed. They are appointed by the legislature and organized into a private corporation. They are clothed with large, if not dangerous, powers, are accountable to no person for their acts, and their doings are not subject to revision by any other body. Their power to make the assessment is absolute, and is limited by no rule but their discretion. * * * If such private corporations may be organized with such absolute power over the property of others, and they can be sustained, then the guarantees for our property are slender and precarious to an extent that but few had supposed. The very object of all government is security to life, liberty and property. If such burdens may be imposed without any rule but the pleasure or whim of three men, and these enforced under our laws, the tenure by which the citizen holds his property is slender indeed.

This law is violative of the 5th section of article 9 of the constitution, and hence the assessment cannot be sustained. * * *

The foregoing authorities, from the standpoint of plaintiff in error, seem to have a direct application as to the constitutionality of the act complained of, and as to the power of the Board of Local Improvement. The principle laid down in the above citations has been followed in other opinions rendered by the Supreme Court of Illinois, among which are:

Wetherell v. *Devine*, 116 Ill., 631 (635).

Snell v. *Chicago*, 133 Ill., 413 (440).

The People v. *Knopf*, 171 Ill., 191 (199-200).

The plaintiff in error feels justified in claiming that the finding against him in this proceeding is contrary to "the law of the land," and in violation of the 14th amendment to the Constitution of the United States.

VI.

SAID ACT IS UNCONSTITUTIONAL BECAUSE IT INTERFERES WITH THE RIGHT OF CONTRACT.

Plaintiff in error insists that certain sections of the act fixing the rate of interest on the judgment of confirmation and on the improvement bonds are illegal, unconstitutional and void.

Section 4 of the ordinance (Print. Rec., page 10) provides for a division of the assessment "into five installments in the manner provided by the statute in such cases made and provided, and each of said installments shall bear interest at the rate of five per centum per annum, according to law, until paid."

Section 42 of the act contains the following:

"* * * The first installment shall be due and payable on the second day of January next after the date of the first voucher issued on account of work done, and the second installment one (1) year thereafter, and so on annually until all installments are paid. * * * All installments shall bear interest, as hereinafter provided until paid, at the rate of five (5) per centum per annum. Interest on assessments shall begin to run from the date of the first voucher issued on account of work done as aforesaid."

Plaintiff in error contends that this provision of the statute is unconstitutional and void because it fixes a minimum and maximum rate of interest at the same amount. It is well known in commercial circles that municipal bonds draw interest in some instances at as low a rate as three per cent. However, the City of Chicago, under the foregoing statute, is prevented from taking advantage of the low rate of interest which often prevails in Chicago and in other cities.

Section 86 of said act, which is in line with Section 42 above referred to, contains the following:

"For the purpose of anticipating the collection of the second and succeeding installments, provided for in this act, it shall be lawful for such city, village or town to issue bonds, payable out of said installments, bearing interest at the rate of five per centum per annum, payable annually and signed by such officers as may be by ordinance prescribed."

This section does not provide for the issuance of improvement bonds for the first installment, while Section 5 of the ordinance states (Print. Rec., page 10):

"And for the purpose of anticipating the collection of the installments of said assessments for said improvement bonds shall be issued, payable out of said installments, bearing interest at the rate of five per centum per annum, payable annually, and signed by the Mayor and by the President of the Board of Local Improvements, countersigned by the City Comptroller, and attested by the City Clerk under the corporate seal of the City of Chicago. * * *"

It is apparent that outside of the constitutionality of Sections 42 and 86, and the ordinance for the

present proceedings, there is a conflict, not only between Sections 42 and 86, as to the installments which shall draw interest, but the ordinance is in conflict with Section 86 in not excepting the first installment in the issuance of improvement bonds.

Plaintiff in error claims that the latter section of the act is in conflict with Section 2 of Article 2 of the constitution of Illinois, which provides that "no person shall be deprived of life, liberty or property without due process of law."

In *Ritchie* v. *People,* 155 Ill., 98, wherein the above provision of the constitution was under consideration, it is stated (104):

"A number of cases have arisen within recent years in which the courts have had occasion to consider this provision, or one similar to it, and its meaning has been quite clearly defined. The privilege of contracting is both a liberty and a property right. * * * Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts. * * * The right to use, buy and sell property, and contract in respect thereto, is protected by the constitution. * * * In this country the legislature has no power to prevent persons who are *sui juris* from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer. The right to labor or employ labor, and make contracts in respect thereto upon such terms as may be agreed upon between the parties, is included in the constitutional guarantee above quoted. * * * The protection of property is one of the objects for which free governments are instituted among men. * * * And when an owner is deprived of one of the attributes of property, like the right to make contracts, he is deprived of his property within the meaning of the constitution."

(105): "This right to contract, which is thus included in the fundamental rights of liberty and property, cannot be taken away 'without due process of law.' The words 'due process of law' have been held to be synonymous with the words 'law of the land.'"

In *McChesney* v. *People*, 200 Ill., 146, where the question of the eight hour and alien labor clauses in contracts for the construction of public improvements were under consideration, the court holds (149):

"The contract is to be awarded to the responsible bidder offering to do the work for the lowest sum, and any provision tending to increase the cost and make the bids less favorable to the public and property owners is against public policy, illegal and void. The provision in the specifications limiting the right of the contractor and laborer to agree with each other upon the length of time which shall constitute a day's labor, and authorizing a forfeiture of the contract if the contractor should allow laborers to work more than eight hours in any one day, was pronounced illegal, unconstitutional and void in *Fiske* v. *People*, 188 Ill., 206, as infringing upon the freedom of contract to which every citizen is entitled under the law."

The holding above seems to be parallel to and in support of the contention of plaintiff in error in regard to the question of interest. It further appears from the authorities cited that any agreement made by the board, and which is to the disadvantage of the property owners, is illegal and void.

In *Adams* v. *Brennan*, 177 Ill., 194, it is stated (201):

"* * * Nor can the fact, if it be a fact, that an individual might make such a bargain authorize

these public officers exercising a public trust to do so. The individual may, if he chooses, give away his money, but the public officer, acting as a trustee, has no such liberty, and no right to surrender to a committee or any one else the rights of those for whom he acts."

The section of the act attempts to take from the Board of Local Improvements, which is a trustee of the property owner, the right to fix the lowest rate of interest possible upon improvement bonds. The property owners have a right to the best contract to be obtained, which involves the amount of such contract and the rate of interest upon deferred payments, if any. Can the legislature restrict the trustee of the property owners in a manner it could not, in the first instance, restrict the property owners themselves? There seems to be only one answer to this question, and that is in the negative.

In *Frorer* v. *People*, 141 Ill., 171, it is held (181):

"The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner in which he has hitherto enjoyed under the law, and which B, C and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract. Our constitution guarantees that no person shall be deprived of life, liberty or property without due process of law. * * * 'Due process of law' does not mean a statute passed for the purpose of working the wrong. * * * These words are held to be synonymous with the words 'law of the land.' * * * 'And this means general public law, binding upon all of the members of the community under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals.'"

In *Millett* v. *People,* 117 Ill., 294, it is held (302):

"The rights of every individual must stand or fall by the same rule or *law* that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. * * *"

In *Bailey* v. *People,* 790 Ill., 28, it is stated (34):

* * * An enactment which deprives one class of persons of the right to acquire and enjoy property, or to contract with relation thereto, in the same manner as others under like conditions and circumstances are permitted to acquire and enjoy property or contract with relation to it, is not comprehended within the true meaning of the words "due process of law," and is prohibited by the provisions of section 22 of article 4 of the constitution of 1870. * * *"

If the legislature were to pass a law fixing the rate of interest upon promissory notes, contracts or any other private obligations at the rate of five per cent. only, such act would undoubtedly be held to be unconstitutional. This illustration, it seems to me, is strictly in point, and applies to the question of interest as here presented.

In a special assessment proceedings the board of local improvements acts as trustee for the property owners, and it must exercise the utmost good faith in performing its duties. It is insisted that the legislature is without power to restrict the right to contact on behalf of the board, acting as such trustee for property owners, to any greater extent than it can restrict the right of contract on the part of a private individual. The law specifically

provides how assessments for improvements shall be made, and power is given to create a lien upon the property affected by the improvement, which lien can be enforced by sale. The law also permits private individuals to construct improvements, under the inspection of the board, at their own expense, and upon such terms as they are able to make. If the legislature attempted to interfere with this right of contract on behalf of property owners, such act would undoubtedly be declared unconstitutional; that is, if the legislature were to pass a law holding that deferred payments on private contracts for street improvements should bear interest at the rate of five per cent. per annum, and no more and no less, such act would be in conflict with section 2 of article 2, above referred to. Can the law affecting the trustee be less liberal than the law governing the principal?

Plaintiff in error feels justified in asserting that the right of contract is involved in the ordinance and in the provisions of the statute under consideration, and that he is deprived of the rights afforded him under the constitution. The question of the amount of interest is as important, in principle, as is the amount of the assessment or the amount of the contract price. If the board of local improvements must pay five per cent. on bonds when money can be procured for a less rate, then the constitution is violated, both in the ordinance and in the sections of the statute referred to.

The principles of law cited above in regard to the right of contract are of such general application, that it does not seem necessary to cite au-

thorities outside of the decisions of the Supreme Court of Illinois. Plaintiff in error, therefore, asks this court to hold that section 86 of said act is unconstitutional and void, and that under it he is deprived of certain rights guaranteed to him by the 14th amendment to the Constitution of the United States.

The plaintiff in error respectfully asks this Honorable Court to set aside the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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